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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 856

ANDREW BERGOTY,

*Petitioner,*

*vs.*

PETER GAMBERA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Andrew Bergoty, prays that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Second Circuit, entered on December 29, 1942 (86), which decree reversed a final decree of the District Court of the United States for the Southern District of New York, dismissing the above entitled case on the ground that the plaintiff had failed to prove a cause of action (56, 57), and remanded the case for further proceedings in accordance with the opinion of the Circuit Court (76, 86).

PROCEEDINGS.

Peter Gambera filed a libel in admiralty in the United States District Court for the Southern District of New York, alleging that at the Port of Trenton, New Jersey, he joined the Greek Steamship *Emmy* on the 21st day of December, 1939, as a fireman, for a voyage from that port to Norfolk, Virginia, and that he was injured on December 23, 1939, because of the unseaworthiness of the vessel and the negligence of the agents, servants and employees of the petitioner (3-6).

It was specifically alleged in the libel that the Steamship *Emmy* flew the Greek flag, was registered at its home port in Greece, and that the petitioner, Andrew Bergoty, owned, operated and was in possession and control of the said steamship (3, 4, 28). It later appeared that the petitioner, Bergoty, was a Greek national (7, 9, 56).

The petitioner made a motion asking the court, in its discretion, to decline jurisdiction on the ground that two aliens were involved and that adequate and full relief was afforded to the libelant under the laws of the Kingdom of Greece (7). One of the affidavits submitted in support of this motion asserted that under Greek law the seaman-libelant was entitled on being injured to an indemnity based upon the degree of his incapacity and the wages he had been receiving (11).

The court denied the petitioner's motion, with an opinion (18, 19, 20, 21). 1940 A. M. C. 632.

Thereupon, the petitioner made a motion that the libelant be compelled to elect whether he was proceeding under the Jones Act, viz: Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. §688), or for unseaworthiness (21, 22). The act referred to is expressly made elective. Its text

will be found on page 6 of this petition. The court granted this motion without deciding the question of whether the Jones Act actually applied (24, 25).

Thereupon, the libelant filed an amended libel in which he expressly elected to proceed under the provisions of the Jones Act (28-31). It appeared that the accident had occurred while the vessel was proceeding through U. S. waters en route to Norfolk and New York (14).

At the trial, the libelant proved that he was an alien, a citizen of Italy who had never been naturalized, but had lived here for twenty years (38, 39). The court dismissed his libel on the ground that he had made a binding election to sue under the Jones Act and had no cause of action under that act because the vessel was a Greek vessel, the libelant an alien seaman, and the owner of the vessel a Greek citizen (56, 57). The court relied upon the decision of the United States Circuit Court of Appeals in *The Paula*, 91 F. 2d 101, cert. den., 302 U. S. 750 (48).

Gambera appealed to the Circuit Court of Appeals, which reversed the District Court in an opinion reported at 132 F. 2d 414 (74-76). Thereafter, the petitioner asked for a rehearing, which caused the court to reconsider the matter (76-84). A second opinion was written *per curiam* in which the court noted some errors in its previous opinion but adhered to the result and denied the petition for rehearing (84, 85). Not yet reported.

The decision of the Circuit Court of Appeals is not final, but this court has a discretion which it may exercise at this juncture. It is believed that the respondent seaman will not urge as a ground for denying the petition that the decree of the Circuit Court is not final.

This court recently granted a petition in similar circumstances where the decree was not final in the case of

*Waterman Steamship Corporation* v. *David E. Jones,* October Term, 1942, No. 582. In that case also the seaman had been dismissed in the District Court but had prevailed on appeal. The case had been ordered remanded to the District Court for further proceedings when this court granted certiorari.

The opinion of the United States Circuit Court of Appeals was written on December 10, 1942, the petition for rehearing was decided on December 28, 1942, and the order for mandate is dated December 29, 1942.

The jurisdiction of this court to review this case on a writ of certiorari is provided by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 928 (28 U. S. C. A., Section 347 (a)).

## Opinion Below.

The Circuit Court of Appeals applied the Jones Act to the libelant because he had been living in the United States, had signed ship's articles in the United States, and had been hurt in territorial waters of the United States, although on a Greek vessel at the time. Solely because the seaman had been living in the United States, the court referred to him as an "American seaman", although, actually, he was an unnaturalized Italian. Thus, by means of the device of applying to the libelant a designation which formerly had been applied only to American citizens or to seamen serving on American ships, and which did not fit the libelant, the court constructed a case which seemed to call for the application of American Law.

At the same time, the court went further and held that the Jones Act applied in general to foreign vessels within

the United States, *i. e.*, to foreign seamen injured on such vessels. The reason for this was that to the court there appeared to be no obstacle to such an application of the statute. In so holding, the Circuit Court relied on a misconception of the holding and the language of this court in the case of *Uravic* v. *Jarka Company,* 282 U. S. 234. That was a case which dealt with longshoremen injured while working on foreign vessels within the United States. Although this court expressly left open the law with respect to members of the crews of foreign vessels within the United States, the Circuit Court has proceeded on the assumption that this court decided in that case that members of the crews of such foreign vessels are to be given the same legal classification as local longshoremen. Thus, the Circuit Court said:

> "We see nothing in the definitory section (§713, Tit. 46 U. S. Code) to limit the application of the Act to American ships or American citizens. As to ships *Uravic* v. *Jarka Company, supra,* was an express answer and thereafter the definition no longer offered an obstacle to including foreign seamen."

Because one obstacle to inclusion of foreign seamen was removed, the court jumped to the conclusion that there were no others. Accordingly, it thought that, if the act applied to any foreign seamen at all, it must apply to alien or foreign seamen resident in the United States.

## Questions Presented.

This case raises an important question involving the application of the Jones Act to seamen on foreign vessels. The Jones Act, Section 33 of the Act of June 5, 1920 (46 U. S. C. 688), provides as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extended the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The question is whether this statute applies to seamen who are injured on foreign vessels while the vessels are temporarily in the United States.

As applied to the facts of this case, the question is whether a seaman, who is an Italian subject but has been living in the United States, who, in an American port, joins a vessel owned by a Greek national and registered in Greece, and who is injured thereafter on the vessel while it is proceeding through the territorial waters of the United States, bound on a voyage which will take it upon the high seas and ultimately to another American port, is entitled to the benefits of the Jones Act.

## Reasons for Granting Petition.

The United States Circuit Court of Appeals for the Second Circuit has decided a question which has never previously been passed upon by this court. This question was

expressly left open in two prior decisions of this court, viz.: *Plamals* v. *S.S. Pinar Del Rio, etc.,* 277 U. S. 151, and *Uravic, admx.* v. *F. Jarka Company Incorporated, et al.,* 282 U. S. 234.

The courts of New York State have decided the same question in a different way. *Clark* v. *Montezuma Transportation Company Ltd.,* 217 A. D. 172; *Resigno* v. *F. Jarka Co., Inc.,* 248 N. Y. 225, at pp. 233, 241.

The United States Circuit Court of Appeals for the Sixth Circuit has decided a similar question and reached a different result in *Grand Trunk Ry. Co.* v. *Wright,* 21 F. (2d) 814, affirmed on a different ground, 278 U. S. 577. That decision is based on principles which are irreconcilable with the law announced in the case at bar.

The question of the scope of the Jones Act has been before lower courts in a number of cases where the questions were related to those involved in the present case. In all these cases, this court has denied certiorari. *The Paula,* 91 F. (2d) 1001, cert. den., 302 U. S. 750; *Hogan* v. *Hamburg-American Line,* 152 Misc. (N. Y.) 405, cert. den., 295 U. S. 749; *Grace Line, Inc.* v. *Toulon,* October Term, 1933, No. 372, cert. den., 290 U. S. 668, reported below without opinion 237 A. D. 982, 262 N. Y. 506.

Questions are constantly arising concerning the application of the Jones Act to seamen on foreign vessels. Such questions concern alien seamen who have signed abroad and are hurt in United States waters, *The Paula,* 91 F. (2d) 1001, cert. den. 302 U. S. 750; alien seamen who have signed in the United States and are hurt in United States waters, *Clark* v. *Montezuma,* 217 A. D. (N. Y.) 172; resident alien seamen who have signed in the United States and are hurt on the high seas, *Hogan* v. *Hamburg-American Line,* 152 Misc. (N. Y.) 405, cert. den., 295 U. S. 749; American

seamen (citizens) who have signed in the United States and are hurt in foreign waters, *Maia* v. *Lamport & Holt Ltd.*, 141 Misc. (N. Y.) 140, aff'd 235 A. D. 821; and American citizens who have signed in the United States and are hurt in domestic waters, *Shorter* v. *Bermuda & West Indies S. S. Co., Limited,* 57 F. (2d) 313.

Even before the present case the decisions were inconsistent and there was no clear principle justifying the results. The present decision muddies the waters still further and does so by resort to a fiction. Thus, the court seems to find it necessary to give to the phrase "American seamen" a wholly artificial meaning in order to justify the application of an American statute to one who, actually, is an Italian.

The same kind of an "American seaman" who had signed on a German vessel in the United States was held not entitled to the benefits of the Jones Act in *Hogan* v. *Hamburg-American Line,* 152 Misc. (N. Y.) 405, cert. den., 295 U. S. 749.

The determination of this question has taken on new significance since the recent decision of this court in *O'Donnell* v. *Great Lakes Dredge & Dock Co.,* October 1942 Term, No. 320, where it was held that the Jones Act applies to seamen injured on shore. The rationale of that decision was that Congress was regulating a subject matter viz. a seaman's right to compensation for injuries received in the course of his employment, whether on sea or land, and that this regulation was an incident to the status of the seaman in the employment of his ship.

If unnaturalized aliens are held to be "American seamen" and are entitled to sue under the Jones Act merely because they live here when not engaged in journeys abroad (that is the force of the decision below), then it is a natural

sequel that such an "American seaman" on a Greek vessel would be entitled to recover under the Jones Act for injuries sustained by him on a Greek vessel while it was lying in a foreign harbor, and even while the "American seaman" was ashore performing his duties in a Greek port.

In the instant case, the alien was injured while the vessel was in domestic waters but while it was enroute to the high seas, whence it intended to sail to another American port. He might just as well have been injured while the vessel was on the high seas as while it was in the Delaware River. If the reasoning of the court below is accepted, the Jones Act would apply to him while injured on the high seas or even in a foreign port.

The confusion which the present case has added to the law is best understood if its principles are applied to seamen of American and Canadian vessels plying on the Great Lakes and the narrow waters connecting them. At times it is difficult to determine whether the vessels of either nation are actually on their own side of the international line. In such circumstances the question of the application of the Jones Act was solved by the Sixth Circuit Court of Appeals in a way wholly different from the case at bar. *Grand Trunk Ry.* v. *Wright,* 21 F. (2d) 814, affirmed on other grounds 278 U. S. 577. In that case, the Circuit Court of Appeals rejected the notion announced here that the Jones Act applies to a member of the crew employed by a Canadian corporation merely because the accident to him occurred in American territorial waters. Instead, the court followed its former decision announced some years before in *Thompson Towing & Wrecking Association, et al.* v. *M'Gregor, et al.,* 207 Fed. 209. In that case, a Michigan death act was applied to a tort occurring on a

vessel lying in Canadian waters but which was owned by a Michigan corporation.

Seamen and their employers are vitally interested in whether their rights and liabilities depend upon the registry of the vessel, the ownership of the vessel, the nationality of the plaintiff, the country where they sign articles, or the number of years they have been shipping out of the United States.

In cases involving seamen on American vessels, the Jones Act has been applied even though the tort occurred while the American vessel was lying in foreign waters. *Alpha Steamship Corporation, et al.* v. *Cain,* 281 U. S. 642.

This court refused to grant certiorari in a case where the Jones Act was applied by the New York State Courts to a seaman from an American vessel injured upon a lighter lying in a Peruvian harbor, where the lighter itself was registered under Peruvian laws. *Grace Line, Inc.* v. *Toulon,* 237 A. D. 892, cert. denied 290 U. S. 668.

Thus, it appears that the Jones Act applies to accidents on American ships all over the world. This is so because of the special circumstances applicable to vessels and their crews and the international features of their employment. It has long been recognized that international comity is best promoted by the application of the law of the flag to members of crews of vessels temporarily in harbors of other nations. *In Re Ross,* 140 U. S. 453. All seamen, whatever their nationality, are taken to be nationals of the country whose flag their vessel flies. *Rainey* v. *N. Y. & P. S. S. Co.,* 216 Fed. 449, at p. 454. In *Plamals* v. *S.S. Pinar Del Rio,* 16 F. (2d) 984, the court said:

> "That libelant is a Spaniard is immaterial, the case is the same as if he had been an Englishman. *The Hanna Nielson* (C. C. A.), 273 Fed. 171, citing

*The Belgenland,* 114 U. S. 365, 5 S. Ct. 860, 29 L. Ed. 152."

The general rule applicable to torts other than those occurring on ship board is that territoriality is the sole test of the law which applies. In *New York Central Railroad Company* v. *Chisholm, adm'r.,* 268 U. S. 29, this court applied the general rule and held that the Federal Employers' Liability Act did not apply to the death of an American citizen in Canada.

And, yet, the general rule as stated in the Chisholm case has been held not to be applicable to seamen and particularly alien seamen injured in United States ports. *Grand Trunk Ry.* v. *Wright,* 21 F. (2d) 814, aff'd on other grounds 278 U. S. 577.

If, as has been repeatedly held, there are special circumstances which make it necessary to apply American law to injuries on American ships, both on the high seas and in foreign ports, then it should likewise be necessary for reasons of comity, and, indeed, of necessity, to apply the law of the ship's flag to foreign vessels which are temporarily in our ports and whose crew members are injured while aboard such vessels. This doctrine should prevail despite the fact that the seaman, perchance, might sign his contract here and despite the fact that he might be an American citizen. A fortiori, it should prevail in the case of aliens merely resident here.

Nearly all maritime nations have special laws which apply to the crews of their vessels and which protect them in case of injury. Such laws represent a long standing expression of social policy which has found similar expression in this country only in recent years. Thus, Great Britain has had a compensation law applicable to seamen since 1906, 6 Edward VII, Chapter 58. France has had

such a law since 1898 (see Loi du 9 Avril, 1898; Loi du 29 Decembre, 1905); Italy, since 1904 (see the Law of 31 January, 1904); Germany, since 1902 (see "Seemannsordnung"). Belgium has a law governing its seamen all over the world. Law of December 30, 1929. In the case at bar it was indicated that Greece has such a law (11, 51, 54).

Seamen's rights under the compensation laws of Denmark and Norway have come to the attention of our courts. *Gonzalez* v. *J. Lauritzen*, 1940 A. M. C. 220, not reported elsewhere; *The Ivaran*, 35 F. Supp. 229; 1940 A. M. C. 1390.

If foreign shipowners are to be subjected to the provisions of American statutory law while their ships are in our harbors, or while on the high seas, or in foreign ports, merely because American citizens or alien residents choose to sign on their vessels in United States ports, then the system of laws which has been established by foreign nations for dealing with these problems will be completely unworkable. Often the seamen themselves make contributions to these compensation funds.

Furthermore, if the United States undertakes generally to interfere with foreign laws to the extent indicated, then foreign nations will be led ultimately to do likewise, and American shipowners will be subjected to foreign law when seamen on their vessels are injured in foreign ports or when they sign on vessels in foreign ports and jurisdiction is obtained over the shipowner therein.

If Congress wishes such a result, then there should be no difficulty on its part in saying so. In the absence of

such explicit Congressional provision there is no reason to believe it ever intended it.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to review the decision below.

ANDREW BERGOTY.

By VERNON SIMS JONES,
Counsel for Petitioner.

Dated, New York, March 25, 1943.

I hereby certify that I have examined the foregoing petition and in my opinion it is well founded and entitled to the favorable consideration of the court and that it is not filed for the purpose of delay.

VERNON SIMS JONES.